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Supreme Court of the United States

OCTOBER TERM, 1941

No. 1097

ODELL WALLER,

Petitioner,

*against*RICE M. YOUELL, Superintendent of the State
Penitentiary, Richmond, Va.,

Respondent.

**MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE,
IN SUPPORT OF PETITION FOR REHEARING.****BRIEF OF AMICI CURIAE IN SUPPORT OF THE
PETITION FOR REHEARING.**

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE
NATIONAL URBAN LEAGUE
AMERICAN CIVIL LIBERTIES UNION
UNION FOR DEMOCRATIC ACTION
WORKERS DEFENSE LEAGUE
BROTHERHOOD OF SLEEPING CAR PORTERS
NEGRO LABOR COMMITTEE
UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA
SOUTHERN TENANT FARMERS UNION

CITIZENS COMMITTEE:

BRUCE BLIVEN
VAN WYCK BROOKS
HENRY SLOANE COFFIN
JOHN DEWEY
HARRY EMERSON FOSDICK
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JOHN HAYNES HOLMES
FREDA KIRCHWEY
FRANCIS J. McCONNELL
OSWALD GARRISON VILLARD

By: ARTHUR GARFIELD HAYS,
THURGOOD MARSHALL,
Counsel

JOSEPH A. PADWAY
LEE PRESSMAN
Of Counsel



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Motion is hereby respectfully made, on behalf of all the organization and individuals signing the subjoined brief, for leave to file such brief, as amici curiae, in support of the petition for rehearing herein.

ARTHUR GARFIELD HAYS,
THURGOOD MARSHALL,
Counsel.

JOSEPH A. PADWAY,
LEE PRESSMAN,
Of Counsel.

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**BRIEF OF AMICI CURIAE IN SUPPORT OF THE
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We, the amici curiae, who submit this brief in support of the petition for a rehearing, do so because we consider the issues of this case, to be of the greatest significance since

“the proper functioning of the jury system, and indeed our democracy itself, requires that the jury be a ‘body truly representative of the community’, and not the organ of any special group or class.” *Glasser v. U. S.*, decided January 19, 1942, 86 L. Ed. 405, 420.

From our examination of all the facts as set forth in the record, we cannot but conclude that the petitioner was convicted of murder in the first degree and condemned to death by a jury from which all persons, who were in the same economic class as the petitioner, were systematically

excluded, and that petitioner's rights, guaranteed by the Fourteenth Amendment of the Constitution of the United States, were thereby violated. It would seem that the jury which convicted petitioner, and from which all non-payers of poll taxes had been systematically excluded, could not have been unbiased. Such a jury by its very composition must have had ingrained biases and prejudices.

"It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Strauder v. West Virginia*, 100 U. S. 303, 309; 25 L. Ed. 664, 666.

We, who have followed this case, know the long, tedious and expensive procedure, the petitioner and his friends were put to, in order to assert those rights guaranteed by the Constitution, and when all State remedies were exhausted and the petition for a writ of certiorari was presented to this Court, we hoped for the granting of the same. The Court, by its order of May 5, 1942, nevertheless denied the petition without opinion.

The Court's denial of the petition without opinion leaves important constitutional questions unanswered.

Two possible reasons may be advanced for the denial of the petition for certiorari. One, that it is constitutional to exclude systematically from a jury, persons of the same economic class as the petitioner; and the other, that even if this be unconstitutional, the procedural error made by the attorneys for the petitioner can never be corrected and the petitioner must die solely for his attorneys' error.

If the Court will expressly indicate that the Fourteenth Amendment cannot be used by the petitioner to prevent the exclusion of 80 per cent of the otherwise eligible fellow citizens of his community to sit in judgment at his trial,

because they did not and could not pay a poll tax, then Odell Waller, his counsel and the State of Virginia will at least have certainty of the law. If, on the other hand the Court will expressly indicate that systematic exclusion of non-poll tax-payers is a violation of the Fourteenth Amendment, but that the failure of petitioner's attorney, to offer proof before trial of the specific facts of such systematic exclusion, was a fatal, uncorrectible error, again certainty of the law should at least tend to protect others against such uncorrectible errors, and relieve this Court of the burden of futile appeals for their correction.

It can be readily seen that the denial of the petition has placed a tremendous burden not only on the petitioner, and those public minded persons who have interested themselves in this case, but has also affected the State of Virginia and all future defendants in criminal trials who shall ask for a jury composed of a cross section of the community and from which the economic depressed will not be excluded. To have denied the petition without opinion was to aggravate the situation by leaving wholly undecided the questions whether such constitutional rights even exist, and if so, what is the appropriate remedy for their violation.

In conclusion, we are joining in this petition for a rehearing, because

1. We cannot believe that this Court is impotent not only to safeguard the petitioner's constitutional rights, but also to indicate how this right of trial by an impartial jury may be concretely sought for in the State and Federal courts. We believe that to secure the rights given Odell Waller under the Fourteenth Amendment, the fundamental fairness essential to the very concept of justice demands that where constitutional issues of importance are raised and recognized by trial and appellate courts, mere technical errors of procedure by counsel, should be disregarded.

2. We believe that the rights which were denied Odell Waller are intrinsically bound up with our democracy, and that as this Court stated in the case of *Glasser v. U. S.*, *supra*, at page 420,

“But even as jury trial, which was a privilege at common law has become a right with us, so also, whatever limitations were inherent in the historic common law concept of the jury as a body of one’s peers do not prevail in this country. Our notions of what a proper jury is, have developed in harmony with our basic concepts of democratic society and a representative government. For ‘it is part of the established tradition in the use of juries as instruments of public justice, that the jury be a body truly representative of the community.’” *Smith v. Texas*, 311 U. S. 128, 130; 61 S. Ct. 164, 165.

It is respectfully submitted, therefore, that the petition for rehearing prayed for be granted.

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